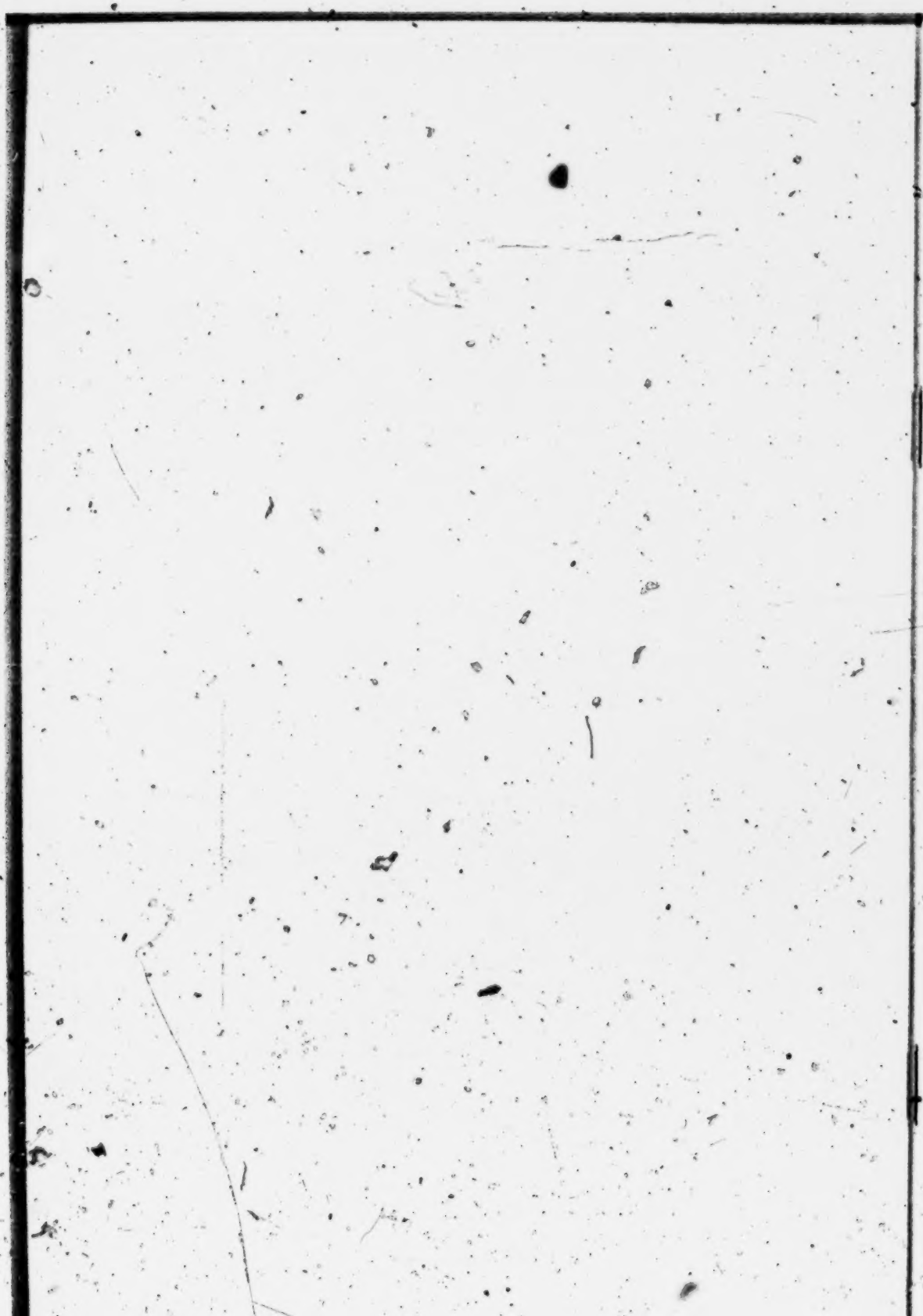

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1103

HERBERT CALLENDER,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS OR AFFIRM

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HERBERT CALLENDER,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee respectfully moves to dismiss the appeal in the above-entitled case on the ground that it does not present a substantial federal question, or to affirm.

The Statute Involved

The relevant portions of Sections 722 of the Penal Law provide:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may

be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

THE EVIDENCE

The People's Case

Sergeant **Dennis Burke** testified that on July 15, 1964, he was on duty at a police gate in a corridor of City Hall leading to the Mayor's Office (4-5).* The corridor, from its beginning point to the gate, was eight feet wide and twelve feet long; the gate itself was three feet wide (5, 13). Beyond the gate were, in addition to the Mayor's Office, the offices of the Executive Secretary to the Mayor, the Legal Assistant to the Mayor, the Secretary of the Deputy Mayor, the Deputy Mayor, several other assistants, and the clerical staff (5). Aside from officials, messengers and clerical help who were permitted to "come right through" the gate, the standard police practice was to admit only persons who had an appointment with someone inside (16).

At about 10:50 that morning, the defendant, accompanied by several other persons, approached Sergeant

* References, unless otherwise indicated, are to the typewritten minutes of trial.

Burke at the gate (6-7). Defendant stated that he had come to make a citizen's arrest of the Mayor and that he wanted Sergeant Burke to assist him (7). The sergeant informed defendant that he would not assist him because he had been advised by the Corporation Counsel and the Legal Bureau of the Police Department that such arrest would be illegal (7). At this point there were about thirty persons in the corridor, standing "four or five across and about six deep," and entry through the gate was possible only by "pushing people aside" (10, 16). The crowd included persons who were waiting to see the Mayor in connection with his scheduled "announcement concerning a gift to Mt. Morris Park," and some newsmen and cameramen (8, 13). After Burke's refusal of assistance, defendant asked him for his identification. The officer showed his badge to defendant and then requested him to leave, telling him "that he was causing a crowd to collect and interfering with the normal business of City Hall by preventing normal exits through the gate" (7-8, 10).

Ignoring Burke's request, defendant began speaking to newsmen, and then approached another officer, Lieutenant Delehanty, requesting his assistance in arresting the Mayor (10). Observing that the crowd had grown larger, Burke approached defendant and again told him to leave because "He obstructed the entrance to the hall and interfered with the Mayor's business" (11). Defendant replied that "he would remain there until he would make the arrest of the Mayor" (11). Burke informed Callender that if he refused to move on, he would be arrested (11). Defendant again refused to move and was then placed under arrest (11).

Lieutenant **John W. Delehanty** testified that at about 10:50 a.m. on the morning in question, the defendant and two others arrived at City Hall and approached the gate leading to the Mayor's Office (18-19). In the eight by twelve foot corridor leading to the gate was a small crowd waiting to be escorted through the gate "for the Mayor's scheduled calendar of a gift for Mr. Rogers from Mt. Morris Park" (*sic*) (20). In a waiting room inside the gate was another group waiting to attend the Mayor's scheduled signing of a minimum wage law (20, 23). The Mayor's schedule that morning also included the signing of some other local laws (20).

Addressing Sergeant Burke at the police desk behind the gate, the defendant stated that he wanted to make a citizen's arrest of the Mayor and wished Burke to assist him (19). Refusing to assist, Burke told defendant that according to the opinion of the Corporation Counsel, such arrest would be illegal (19). Defendant repeated his request and Burke again refused (19). Turning then to Lieutenant Delehanty, defendant twice made the same request and Delehanty twice gave the same answer as Burke had given (19). At this time a crowd of about forty or fifty persons had collected in the corridor; there was no access to the gate because "It was impossible to get through the crowd that was gathered around" (21, 24). Sergeant Burke then "asked Mr. Callender to leave * * * because he was causing a crowd to collect and interfering with the normal business of City Hall" (19). Defendant refused whereupon Lieutenant Delehanty reiterated the request (19). When defendant again refused, Burke placed him under arrest (19-20).

The Defense

Herbert Callender, the defendant, previously convicted of unlawful intrusion, testified that he was a field secretary for the Congress of Racial Equality (25, 36). At about 10 a.m. on the day in question, together with two other CORE workers, he arrived at City Hall and approached a gate leading to the Mayor's Office (26, 30). Standing directly in front of the gate, Callender announced to Sergeant Burke that he had come:

> "to effect a citizen's arrest of Mayor Wagner, charging him with misappropriation of public funds, that the funds were being used for public protection supplying contractors and discriminated against Negroes and Puerto Ricans, that to focus this law, this is one of the means that we wanted to bring before the court" (26-7).

In the corridor leading to the gate were many people, including "a number of pressmen" (30). Callender had previously issued a press release announcing his intended arrest of the Mayor at City Hall (30).

Replying to defendant, Burke declined to assist because he had been advised that such an arrest would be illegal (27). Defendant moved to the side of the gate and continued his conversation with Burke (27). As they spoke, newsmen thrust a radio microphone between them (27). Unsuccessful with Sergeant Burke, defendant then walked over to Lieutenant Delehanty and reiterated his request (28). Delehanty also refused to assist (28). A few minutes later, as defendant stood "up against the

wall," Burke approached him and asked whether he was going to leave (28). Defendant explained to Burke:

> "I am not here to engage myself in any civil disobedience * * * but I am here to make a citizen's arrest and I believe that is my right, and that I was willing to wait until that arrest could be effected when some police officer could assist me with it. I was willing to try to find at least one" (28).

Admonished that he would be arrested if he did not leave, defendant again requested Burke to assist him whereupon the officer placed him under arrest (28).

ARGUMENT

No Substantial Federal Questions Are Presented

On a busy morning at City Hall, defendant, flanked by two confederates and followed by numerous reporters and television cameramen, walked to the police gate in the narrow corridor leading to the Mayor's Office and announced to the officers there that he wanted their assistance in making a citizen's arrest of the Mayor. Declining to assist, the officers explained that they had been advised by the Corporation Counsel that such arrest would be unlawful. Defendant, however, continued to request their assistance. Finally, the officers informed defendant "that he was causing a crowd to collect and interfering with the normal business of City Hall by preventing normal [access] through the gate," and they requested him to move on (8). The small, eight by twelve foot corridor leading to the gate, previously uncrowded, had, upon de-

fendant's arrival, suddenly become jammed by a crowd of over thirty persons, standing "four or five across" (16), and "[i]t was impossible to get through the crowd" (21) without "pushing people aside" (10).

Brazenly ignoring the police requests, defendant turned to a group of reporters and began speaking to them. The officers, knowing that the Mayor had a busy schedule that morning again requested that defendant leave. Persisting there, defendant replied that "he would remain * * * until he would make the arrest of the Mayor" (11). At this time defendant was placed under arrest.

Unquestionably, defendant's acts, causing total obstruction of a public entrance to a vital wing of City Hall, constituted disorderly conduct under New York Penal Law Section 722, Subdivision 2. That provision, as construed by the New York Courts, proscribes conduct causing "serious annoyance" to others [*People* v. *Carcel,* 3 N. Y. 2d 327, 331 (1957); see *People* v. *Perry,* 265 N. Y. 362 (1932); *People* v. *Most,* 171 N. Y. 423 (1902)]. In contrast to the "generalized" breach of the peace statutes condemned by this Court in *Edwards* v. *South Carolina,* 372 U. S. 229, 237 (1963) and *Cox* v. *Louisiana,* 379 U. S. 536 (1965) [cited by appellant, brief, pp. 10, 12], Subdivision 2, as construed, has been "limited to define and punish specific conduct lying within the domain of State power" [*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 573 (1942)]. Illustrating the narrow compass of Subdivision 2 is the New York Court of Appeals' reversal of two leaflet distributors' conviction under this provision because the evidence showed "only * * * that the defendants were blocking the pedestrian's right of way" [*People* v. *Carcel, supra,* at 332].

Additionally, the evidence amply supports defendant's conviction under Subdivision 3 of the statute. As construed by the New York Courts, this law punishes only the refusal to obey a reasonable order [*People* v. *Galpern*, 259 N. Y. 279 (1932); *People* v. *Nixon*, 248 N. Y. 182 (1928); see *People* v. *Penn, et al.*, 48 Misc. 2d 634 (Appellate Term, First Dept. 1964), aff'd 16 N. Y. 2d 581 (1965), *cert. denied* 383 U. S. 969 (1966).] The criteria of reasonableness are the necessities of the situation. Thus, in *People* v. *Feiner*, 300 N. Y. 391 (1950), the New York Court of Appeals, deeming lawful a police order to move on, relied upon evidence that defendant attracted a crowd which "filled the sidewalk and spilled out into the adjacent thoroughfare, obstructing or impeding both pedestrian and vehicular traffic" [*id.* at 400].

In *Feiner* v. *New York*, 340 U. S. 315 (1951), this Court upheld the constitutionality of Subdivision 3. And, recently, in *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965), this Court, in dicta, deemed constitutional a Birmingham ordinance which, as construed by Alabama courts, punished failure to obey a police order to move on based on the accused's "blocking free passage" [*id.* at 91].

Seeking to justify his disruptive conduct, defendant contends that his attempt to arrest the Mayor was a form of expressing a political cause—the Mayor's alleged wrongful appropriation of public funds through building contracts with unions practicing racial discrimination—and, therefore, was protected by the First Amendment. It is true that certain forms of nonverbal expression have been accorded First Amendment protection, such as "pa-

trolling, marching, and picketing'' [*Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965)], exhibition of a flag [*Stromberg* v. *California,* 283 U. S. 259 (1931)], and even hanging a clothesline filled with dirty clothes on a front lawn [*People* v. *Stover,* 12 N. Y. 2d 462 (1963)]. However, the conduct here—an attempted physical seizure of another person—is so obviously beyond the pale of the most far reaching constitutional embrace of nonverbal expression that it merits no protection. Presumably, by defendant's reasoning, a physical attack on the Mayor intended as a petition for the redress of grievance would fall within the ambit of the First Amendment. Defendant's argument wholly distorts the nature of the right bestowed in the First Amendment.

Moreover, defendant's argument incorrectly assumes that the act in question here is his attempt to arrest the Mayor. Examination of the record, however, clearly reveals that the thrust of the case against defendant was his continued, disruptive presence in City Hall after his attempt to arrest the Mayor had failed by virtue of the police officer's adamant refusals to assist him in effecting a citizen's arrest.

Even assuming, however, that defendant's conduct was a form of First Amendment activity, its restriction was proper. This Court has consistently held that communication of ideas in public places is subject to reasonable regulation [*Cox* v. *Louisiana,* 379 U. S. 550 (1965); *Poulos* v. *New Hampshire,* 345 U. S. 397 (1953); *Feiner* v. *New York,* 340 U. S. 315 (1951); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Cox* v. *New Hampshire,* 312 U. S. 569 (1940);

Schneider v. *State*, 308 U. S. 147 (1939)]. And, it is equally clear that where communication is by conduct, the First and Fourteenth Amendments do not "afford the same kind of freedom * * * as these amendments afford to those who communicate ideas by pure speech" [*Cox* v. *Louisiana, supra*, at 555; *Giboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490 (1949)]. In the instant case, the disruption caused by defendant's First Amendment activity unquestionably rendered the application of Section 722 a reasonable regulation [*Feiner* v. *New York*, 340 U. S. 315 (1951)]; particularly since the First Amendment activity, if indeed it was that, was in the lesser protected form of conduct, not "pure speech" [*Cox* v. *Louisiana, supra*. at 555; see *People* v. *Penn et al.*, 16 N. Y. 2d 581 (1965), *cert. den.* 383 U. S. 969 (1966)].

Furthermore, any substantiality to the issue of the application of Section 722, Subdivisions 2 and 3 to defendant's alleged First Amendment activity is diminished by virtue of this Court's recent grant of certiorari in *Turner et al.* v. *New York* (No. 399, to be argued on April 12, 1967). The claims made by the instant defendant are virtually identical to those raised by petitioners in *Turner*.

Misguided is defendant's reliance on *Cox* v. *Louisiana, supra*. There, reversing convictions under a *Louisiana* breach of the peace similar to Section 722, this Court held the application of the statute unconstitutional because it allowed "persons to be punished merely for peacefully expressing unpopular views" [*id.* at 551]. In contrast, the statute here was directed not at defendant's expression of unpopular views, but at his obstructive behavior and failure to obey reasonable police commands. Indeed, as noted

above, the *Cox* opinion cogently reaffirmed the validity of reasonable State regulation of disruptive First Amendment activity such as defendant's in the present case.

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy * * * A group of demonstrators could not insist upon the right to cordon off a street or entrance to a public or private building * * *" [*id.* at 554].

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented; in the alternative, the judgment below should be summarily affirmed as eminently sound and fully consistent with pertinent constitutional principles.

Respectfully submitted,

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